

IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0036 OF2006S
(High Court Civil Action No. HBC 24/2003)

BETWEEN:

FIJI NATIONAL PROVIDENT FUND

Appellant

AND:

COLONIAL (FIJI) LIFE LIMITED

Respondent

Coram:

Pathik, JA
Scutt, JA
Powell, JA

Hearing:

Wednesday, 2 April 2008, Suva

Counsel:

P Knight for the Appellant
J Apted for the Respondent

Date of Judgment: Tuesday, 8 April 2008, Suva

JUDGMENT OF THE COURT

- [1] This is an appeal from the decision of Winter J who in his judgment of 13 March 2006 dismissed the plaintiff's claim and ordered the plaintiff to pay costs on an indemnity basis. The appeal is from the indemnity costs order, the plaintiff/appellant contending that costs ought to have been awarded on the ordinary basis.
- [2] The issue in the proceedings below was whether sales representatives and district sales managers of the defendant were employees of the defendant or independent

contractors which in turn depended upon whether or not agreements between the defendant and the representatives and managers were a sham [judgment paras 6, 36].

- [3] The trial Judge, in a carefully reasoned judgment, found the agreements were not shams. The plaintiff's case focused on the nature of the work done by the representatives and agents before and after the new contracts were signed but the trial judge held [paras 79ff] that it was not the nature of the work performed that was relevant or decisive but the contents of the contracts, which, he found [para 95] contained ample evidence describing the rights and obligations of an independent contractor. The trial judge found [para 96], that *"the plain terms of the agreement cannot be construed in any other way"*.
- [4] The trial judge then directed the defendant to prepare bill of costs and disbursements in taxable form on an indemnity basis and to send them to the Master for taxation.
- [5] The appellant contends that there was no basis for awarding indemnity costs and that the trial judge erred firstly in making such an award when the defendant had not sought it and secondly in not providing reasons for such an indemnity award.
- [6] The respondent in its written submissions below sought costs on a *"generous lump sum basis"*, and contends that in oral closing submissions it was said that this should be in lieu of indemnity costs which submission counsel for the plaintiff responded to. Counsel for the plaintiff does not have this recollection. Unfortunately the trial judge's notes for that part of the trial are incomplete.
- [7] The respondent says that leave to appeal should not be given and that if the appellant had sought leave from the trial judge reasons for the indemnity award reasons could then have been given.

- [8] The respondent further says that the reasons for the indemnity award are apparent by inference from the circumstances in which the costs were awarded and points to matters in the judgment below that support such an award. These circumstances include matters referred to in para 79, 95 and 96 of the judgment [see para 3 above], not leading evidence or making submissions on an essential part of the case and not joining essential parties to the proceedings [essential if the plaintiff were to succeed].
- [9] An appellate court ought not to interfere with the exercise of a discretionary order by a trial judge unless it appears that some error has been made in exercising the discretion and that a substantial wrong has occurred: **House v The King** [1936] 55 CLR 499.
- [10] Where a judge departs from the ordinary costs order the judge should give reasons for such departure. However *“where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making the order”*: **English v Emery Reinbold & Strick Ltd.** [2002] 3 ALL ER 385 at p.395 – 396.
- [11] In our view there are some findings in the trial judge’s reasons for judgment for this Court to infer reasons for the award of indemnity costs, being the matters referred to in paragraph 8 of this judgment, but without a complete understanding of the evidence or the course of the hearing it is difficult for this Court to know whether those reasons are sufficient to found an award of indemnity costs: See **Czerwinski v Syrena Royal Proprietary Limited** [2000] VSC 135.
- [12] In any event this would not dispose of the second limb of the appeal, namely that the appellant was denied natural justice because it was afforded no opportunity to be heard against an award of an indemnity costs. There is no doubt that the plaintiff ought to have had such an opportunity. If a judge departs from the ordinary costs

order it is incumbent on the judge to give reasons, albeit short reasons, for taking that unusual course: English v Reinbold at 395.

- [13] The plaintiff failed to seek leave to appeal from the trial judge. Section 12(2)(e) of the Court of Appeal Act provides that no costs appeal shall lie *"without leave of the Court or the judge making the order."*
- [14] No such leave was obtained but the appellant asks this Court to give leave under s.17 of the Court of Appeal Act which provides *"Notwithstanding anything herein before contained, the Court of Appeal may entertain an appeal made under the provisions of this Part on any terms which it thinks just."*
- [15] It appears that the plaintiff did not appreciate that it needed leave to appeal. If leave had been sought the trial judge may have given the plaintiff an opportunity to address him on indemnity costs. It would certainly have given the trial judge the opportunity to provide explicit reasons for the award of indemnity cost.
- [16] The trial judge is no longer a judge, having left Fiji in late 2007 so there is no possibility of remitting the matter to the trial judge for further argument and reasons.
- [17] An appellate court will seldom be as well placed as the trial judge to exercise a discretion in relation to costs: English v Reinbold at 396 (a); and on one view the plaintiff ought to be refused leave to appeal being in a sense the author of its own misfortune by neglecting to seek leave from the trial judge.
- [18] However, in the somewhat extraordinary circumstances of this case, namely that the trial judge has made an order which neither parties sought, being an order for which no reasons were given and the trial judge no longer being a judge, the Court is of the opinion that leave should be granted, that the appeal be allowed and that in

substitution of the costs order below the plaintiff be ordered to pay the defendant's costs on a lump sum basis in the sum of \$75,000.

[19] The Court makes this lump sum award of costs taking into the account the following matters:

- (1) The matters referred to in the judgment below and repeated in the para 8 of this judgment;
- (2) That, as counsel informed the Court, the defendant's allowed taxed costs on an indemnity basis would likely be in the order of \$90,000 and on the ordinary basis in the order of \$60,000; and
- (3) That the defendant in the proceedings below sought a lump sum costs order.

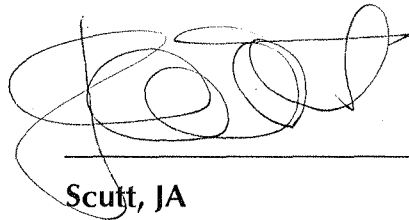
[20] The order for the lump sum of costs means that the appellant has not been completely successful in this appeal. In view of this, and the fact that much of the appeal was concerned with the failure of the appellant to obtain leave to appeal, the Court will make no order as to be costs of the appeal.

[21] The orders of the court are:

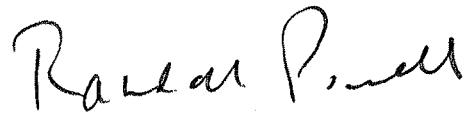
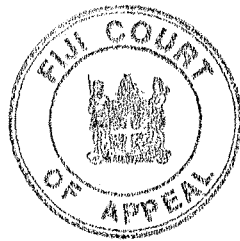
- (1) The appellant is granted leave to appeal
- (2) The appeal is allowed
- (3) Order 2 of the Court below is vacated
- (4) The plaintiff is ordered to pay the defendant's costs of the proceedings below in a lump sum of \$75,000.



Pathik, JA



Scutt, JA



Powell, JA

Solicitors:

Cromptons, Suva for the Appellant
Munro Leys, Suva for the Respondent